No. 2726.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARY MURRAY and LENA MURRAY, a Minor, by her Guardian *ad litem,* MARY MURRAY,

Plaintiffs in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

THEODORE A. BELL,
MILTON K. YOUNG,
Attorneys for Plaintiffs in Error.

Filed this.....day of January, A. D. 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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The plaintiffs in error, Mary Murray and Lena Murray, commenced an action in the Superior Court of the County of San Luis Obispo, State of California, on August 11, 1913, for the purpose of recovering damages against the defendant in error, in the sum of fifty thousand dollars ($50,000.00) on account of the death of Henry Murray alleged to have occurred on May 30, 1913, by reason of defendant's negligence.

The cause was thereafter removed to the United States District Court of the Southern District of California, Southern Division, and tried before the court, sitting with a jury. On May 28, 1914, the jury re-

turned a verdict in favor of the plaintiffs in the sum of five thousand dollars ($5,000.00). Judgment was entered upon this verdict on November 30, 1914. Thereafter, the defendant in error moved for a new trial upon the grounds set forth in its notice (pp. 44 *et seq.,* Transcript of Record). On September 11, 1915, the Honorable District Judge granted the motion for a new trial, and vacated and set aside the verdict and judgment therein, before entered. The plaintiffs in error now specify as error, upon which they rely, the action of the Honorable District Judge in granting a new trial herein and setting aside and vacating said verdict and judgment.

It was subsequently stipulated between the parties that the cause should be submitted to the District Court, sitting without a jury, upon all of the evidence taken at the previous trial, for the purpose of permitting the defendant to move for a non-suit therein (pp. 59 *et seq.,* Trans.).

On September 11, 1915, the cause came on for trial, and pursuant to said stipulation, all of the testimony and evidence taken at the former trial was submitted to the court sitting without a jury, and thereupon the defendant moved for a non-suit upon the grounds set forth in defendant's motion, which appears upon page 62 of the Transcript. The motion for a non-suit was granted and judgment therein was entered in favor of the defendant, and against the plaintiffs, on September 11, 1915 (pp. 63 *et seq.*).

The plaintiffs in error now specify the following

additional errors upon which they rely, and which they intend to urge, to-wit:

1. That the court erred in granting defendant's motion for non-suit, to which ruling of the court plaintiffs by their counsel duly excepted.

2. The court erred in granting defendant's motion for non-suit because the evidence showed that the accident complained of was the result of the negligence of the defendant, and that deceased was not guilty of such contributory negligence which, as a matter of law, would preclude the plaintiffs' right to recover.

3. The court erred in granting defendant's motion for non-suit because the evidence showed that the accident complained of was the result of the negligence of the defendant.

4. The court erred in granting, making, rendering and entering a judgment of non-suit in said cause in favor of the defendant and against the plaintiffs.

These errors were assigned in the plaintiffs' assignments of error, found at page 109 of the Transcript.

The testimony of Thomas Moran, witness for the plaintiffs (pp. 69 *et seq.,* Trans.), shows that on the evening of May 30, 1913, the witness and the deceased left San Francisco for Santa Margarita, in San Luis Obispo County, on one of the regular passenger trains of the defendant corporation. They arrived at Santa Margarita at about eleven o'clock that night. While they were seated near the front of the smoking car, the brakeman, Edward Mulville,

passed through the car, and Murray said, "I think I know that fellow, and I know his father". Afterward Murray got up and spoke to the brakeman, and later on, the deceased and the brakeman talked together. Murray told the brakeman about his mission to Santa Margarita—that they were going to stop at the Santa Margarita Hotel. Neither the witness nor the deceased had ever been to Santa Margarita, and Murray asked the brakeman where the Santa Margarita Hotel was. Mulville replied, "The Santa "Margarita Hotel is on the opposite side of the "station; the station is on the left side and the Santa "Margarita Hotel is on the right side, *and when we "get there I will show you where to get of.*" As we came into Santa Margarita the whistle blew, Mulville came in from the rear of the smoker and called and beckoned to Moran and Murray and said, "This is where you fellows get off." They went to the rear end of the smoker, the brakeman leading the way, followed by Murray and the witness. The brakeman opened up the gate, the trap and the door on the front end of the coach immediately behind the smoker, and pointed out and said, "There is your hotel up there," and he left at once and went to the front end of the smoking car. Murray started down the steps as the train was slowing down—just gliding along. When Murray was on the last step, the witness glanced up and saw the light upon the ground; saw that they were going quite fast. Murray made a motion as if to step off, and alight from the train. The witness called to him, but it was too late; he was

over-balanced and went off. While Murray was standing on the steps he had a grip in his left hand and had hold of the hand-hold on the right hand side with his right hand. As Murray went to step off the steps he extended one foot and as the witness called to him, the deceased tried to recover himself, the grip swung out and his left hand swung around and "he went just as quick as that (snapping fingers)." His back was toward the engine when he fell. When the brakeman pointed out to Murray and said, "There is your hotel," the witness was immediately back of Murray. The brakeman went down the steps a ways and he had to stoop down to point to it (the hotel) when they were coming into the station. The witness saw the lights but could not distinguish to which one the brakeman was pointing. "It was so dark "that you couldn't see a thing there. It was very "dark excepting where the lights of the train—where "I was the light shone there from the smoker I came "out of and also the lights from the coach behind was "showing through, and there was a porter or some-"body standing just inside the door of that coach, "and that door was open. It was too dark to see "the ground immediately below the step. The only "reason why I knew that Murray was making a mis-"take was because I got a glimpse of the ground from "the lights of the car windows down below. There "were street lights burning, either coal oil or gas "lights, but the street was a considerable distance "from the car tracks. These lights were very dim "and did not flash on the ground, and there was no

"light immediately in front of the steps when Mur-
"ray stepped off. I immediately got off the train
"and went back and found Murray lying alongside
"the tracks with an awful hole in the back of his
"head. Murray lived about three hours."

The witness further testified (p. 73, Trans.) that the doors on the station side between the smoker and the first coach had not been opened before the train came to a standstill.

Murray was a large man, five feet eleven inches high, and weighed about two hundred and thirty pounds. He was thirty-eight years of age and enjoyed first-class health.

The train was a solid vestibuled train, at least vestibuled between the smoker and the first coach. There was no platform provided for passengers where Murray attempted to alight.

On cross-examination (p. 75 *et seq.*) the witness testified that the deceased did not turn his back to the engine while he was on the car. When he went out hanging on to this thing (evidently the hand-hold referred to in his direct examination), it swung him with his back to the engine. "The train was going
"probably twelve miles an hour. I saw Murray
"step off, he stepped like he thought there was an-
"other step or the ground. He heard my warning
"and tried to recover himself. He tried his best to
"recover himself, but he could not get back. The
"Santa Margarita Hotel is, I should judge, about be-
"tween 300 and 350 feet—or perhaps 400 feet north,
"then west—from the line directly north—about 150

"or 200 feet. The train traveled about 350 or 400 "feet after Murray stepped off. He could see out if "he wasn't trying see where he was stepping. I don't "know how that looked to him from that position, I "could not say down there."

On redirect examination, the witness testified that "Murray fell *about opposite the hotel—very nearly* "*opposite.* We were getting off opposite the hotel "because that is why we were directed to get off by "the brakeman. That is the reason we went off that "way, was to get to the hotel. *We went out there* "*because of the language and actions of the brake-* "*man.*"

On pages 78 and 79, Trans., the witness further testified: "As I say, we had never been in the town be- "fore, neither one of us, and the brakeman had of- "fered to show us where to get off, and whether you "want to put it for saving time, or whatever the mo- "tive was, it doesn't make any difference to me. "That was where we were to get off and go to the "hotel."

"THE COURT: The question is not whether it "makes any difference to you; the question is what "was your reason for getting off at that particular "place?

"A. *Because we were directed to do so by the* "*brakeman.*

"Q. (By MR. BELL): Was that the only reason?

"A. Yes."

The plaintiffs Mary Murray and Lena Murray gave testimony on their own behalf, which appears

on pages 83 et seq., but this testimony related to the business earnings of the deceased, his treatment of his family, etc., and neither of these witnesses testified to any of the immediate circumstances attending the death of the deceased.

Edward Mulville, the brakeman, was called as a witness for the defendant. He testified that as the train was going into Santa Margarita, after the whistle had been sounded by the engineer, he went through the chair car and twice announced the station, came out of the chair car, opened the vestibule on the station side, went into the smoker and called out "Next station is Santa Margarita", advanced to the middle of the car, called out "Santa Margarita" again, his intention being to go to the forward part of the smoking car. Mr. Murray was standing clear of the aisle, in the center of the car, on the right-hand side, and he said "Good night, Ed". The witness said, "Here, this is where you get off; you can get out here in the morning on train 231 at 7:28". (P. 86, Trans.) The witness further testified that Murray sometime previous had asked him, "Where is the Santa Margarita Hotel?" and that the witness had replied, "The Santa Margarita Hotel is on this side and the station is on this". The brakeman further stated (P. 87, Trans.), that he said to Murray, "Now you will have to wait because we stop here a little while, say about ten minutes, and we take water and also pick up a helper." And Murray said, "Well, can't you let me over there right away?" To which the witness had replied, "No, the station is on that side, and that is the

side you will have to alight on." But later on, according to the witness, he said to Murray, "Here, I will tell you what I will do. At this station, on account of picking up a helper, I will open the trap and then when the train stops you can cross over, *and when it does stop it will be almost directly opposite the hotel.*" Further testifying, the witness declared that he went back and opened the vestibule and while he was standing there, Mr. Murray came along, that he, the brakeman, opened the vestibule but that he did not point out the hotel; that he said "Do you see the lights over there? That is Santa Margarita"; that there were three passengers to get off at that point, and that one of them was in the front car—the smoking car; that the witness looked forward and the man was reclining in his seat as though he had gone to sleep; that the witness went up to the passenger and called out "Santa Margarita"; that then he turned his head and looked back and saw Mr. Moran standing in the vestibule—not in the vestibule, but clear of the vestibule, inside of the car, close to the door; that the witness then opened the vestibule door on the station side, *and just as he got the vestibule open the train came to a standstill, and he looked back and Mr. Murray was still on the inside of the car,* and at no time was he out in the vestibule while he had any kind of conversation; that the next time he saw Moran and his friend they were standing on the end of the smoker, Murray leaning up against the open door of the smoker and Moran standing opposite; that both were inside of the car; that the witness opened the vestibule

door for the purpose of going over and getting a helper; not so much for getting off there, but for getting on after he had coupled the helper on; that his reason for opening the door (opposite the station) was because he frequently rode the tender out of the station, and "then the speed is picking up I drop off the train and catch that side", boarding the train while it is in motion.

This witness testified (p. 90, Trans.) that he did not suggest or invite Mr. Murray to alight on the right-hand side of the train; that he had advised him that the vestibule doors would be opened on the station side, and that he did open these doors on the station side.

On cross-examination (pp. 90 *et seq.,* Trans.) the witness testified that he opened the vestibule doors on the rear of the smoking car, on the station side going into Santa Margarita station before the train arrived at the station; that the vestibule doors on the station side were open before he saw Murray, and before he announced "Santa Margarita" in the smoking car; that the train was still in motion preparatory to making the station stop, going about twelve miles an hour; that afterward he opened the vestibule doors on the right-hand side toward the hotel when he saw he couldn't make the smoker; that when he opened the vestibule on the hotel side, they were not going twelve miles an hour; that he had already opened the vestibule on the station side before he opened them on the other side; that after opening the vestibule doors on the station side, he went into the smoker to announce the

station; that Murray was already standing and Moran was sitting on the left-hand side and he immediately got up and got his suitcase; that the witness went right up in the middle of the car and called again, and was talking with Mr. Murray; that he then went back again and when he saw that he couldn't make the head end because they were going too slow, he went on back; that Moran and Murray did not follow him directly; that he opened the vestibule doors on the hotel side when Murray came up there, and the witness said to him, "See the lights over there? That is Santa Margarita"; that it took about twenty seconds, or something like that, to open the vestibule doors on the hotel side; that Murray wasn't close to him—he was standing right inside of the car; that Murray didn't come out on the platform at all; that neither Murray nor Moran came out on the platform when the witness opened the doors; that the train was going about twelve miles an hour when he opened the vestibule doors on the station side.

"Q. Were you not violating Rule No. 837 when "you opened those vestibule doors before the train "came to a standstill?"

"A. We were all inside the station limits. I was "not violating the rule. I can recite it—that trap- "doors inside those vestibules must be kept closed "while the train is in motion. I opened those vesti- "bule doors on the station side while the train was "going about twelve miles an hour and they were "open until the train came to a standstill at the sta- "tion."

The witness further testified that he was a witness before the coroner's inquest upon the body of the deceased; that he had testified that there was but one vestibule door open on the opposite side and three on the station side; that he did not open the vestibule on the opposite side of the train on the front end of the smoker.

The following portion of the testimony given by the witness before the coroner was read to him, as follows:

"Q. 'A. Yes, sir, I looked out first, it is a passing "track there and I looked out to make sure. Q. Do "you know, Mr. Mulville, whether there were any "other of the vestibule doors on that train open, on "that side of the train? A. There was one on the "head end of the smoker, just as we got into Santa "Margarita. I opened it to get off on that side to get "the helper in.' Did you so testify? A. No sir, I "did not."

"Q. I will read a little further: 'Q. In other "words, merely two vestibule doors, one on the front "and one on the rear end of the smoker were the only "vestibule doors that were open on the side opposite "from the depot at Santa Margarita? A. Yes, that "is, on the engineer's side. Q. That was done at "Mr. Murray's request—as a matter of accommoda-"tion to Mr. Murray? A. At his request and as a "matter of accommodation."

(By Mr. Bell): "Q. Now, I ask you, did you "open that vestibule door at the rear end of that "smoker, on the wrong side of the train, for your "own accommodation, or for the accommodation of "Henry Murray?"

"A. For my own accommodation."

"Q. Why did you testify then, at the coroner's in-
" quest if you did testify—?"

"A. I will say candidly that I don't remember tes-
" tifying to that question. I don't remember the ques-
" tion being asked or answering it. And furthermore,
" regarding the question of Mr. Kaetzel, I don't re-
" member him asking that question. It was the coro-
" ner asked it. He says, 'Were there any other doors
" open on the opposite side?' I says, 'No, sir.' Then
" he says, 'There was but one door open on that side?'
" I says, 'Yes, sir.' "

(By MR. BELL) (p. 94, Trans.): "I will ask you if
" you didn't testify as follows:"

"Q. 'The vestibule doors of the rear cars? A. Yes,
" sir, that was done after we left the west switch.
" Q. You do that as you are coming into the station?
" A. Yes, I was doing it as we—were coming into
" Santa Margarita. When I met Mr. Murray in the
" smoker, I was pressed for time to get to the head end
" and I went right back and done it, and the last I
" see of him he was standing in the door of the smoker
" at the rear end, and I had to squeeze myself by, he
" was a man of large proportions and I was going to
" say something in a joshing manner, but I left him
" there, I didn't have time to talk. Q. The right-of-
" way was clear? A. Yes, sir, I looked out at first, it
" is a passing track there and I looked out to make
" sure.' "

(MR. BELL): "Q. Was there a passing track there
" where Mr. Murray got off?"

"A. There is a siding there on that side; the siding "is on that side. I looked out there to make sure that "there was no train in there because after telling him "the conditions that I was working under there, I "told him he could get off—after telling him he "would have to get off at the station side, that he "could cross over, if there was a train there I could "have told him there was one there, and he would "have to wait anyway. I looked out to see if the "track was clear, on my own account * * * I "looked out partly for Mr. Murray. If there was a "train there I could have told him. I told him when "the train stopped the rear end of the smoking car "would be almost directly in front of the hotel. * * * "I did not tell him anything about crossing over the "right-of-way; I said he could go over right away "without having to wait. * * * I didn't know "when I left him that he was going to get off on "that side; to all intents and purposes he looked as "if he was going to get off on the station side. * * * "I told him that after the train came to a stop, he "could cross over from one side of the train to the "other through the vestibule. I did not tell him that "I had to open up that vestibule to get back onto the "train. I says, 'Here, on account of picking up a "helper I will open the vestibule on that side.' I "told him that just as a matter of accommodation, so "that while we were standing there he could cross "over and go to the hotel."

On redirect examination, the witness testified as follows (p. 100, Trans.):

"Murray was picked up about 300 feet from where "the car stopped—about four cars. Murray was per- "fectly sober. When the vestibule door on the station "side was opened, the train was going about twelve "miles an hour; when the vestibule on the opposite "side was opened about seven or eight miles."

A. B. SPEAR, the conductor, was called as a witness for the plaintiffs in rebuttal, and testified as follows (pp. 100 *et seq.*, Trans.):

"I do not recall having had any conversation with "the brakeman as to why he had opened the vestibule "door on the opposite side of the train."

(At the request of Mr. Bell, witness examines the transcript of testimony given by him before the coroner at the inquest.)

"Q. Let me read it to you now: 'Q. I would just "like to ask you what the regulations or rules of the "company are as regards opening the vestibule doors "as applying to the Santa Margarita station. A. It "is customary for passengers to detrain at the station "side there as other places, there is a positive injunc- "tion against opening the vestibule doors opposite the "station on double track.' You so testified, did you?"

"A. Yes."

"Q. And that is correct, the matter you testi- "fied to?"

"A. Yes."

"Q. 'Is there a double track at Santa Margarita?' "

"A. 'No, perfectly clear, that is, no side track "close to the track there.' Q. Is that a fact?"

"A. Yes, sir."

"Q. 'Q. Then what would be your understanding " that this positive rule forbidding the opening of ves- " tibule doors on a side opposite the depot would ap- " ply to Santa Margarita? A. We, no, I don't think " so; in the case of this man, *as I hear the brakeman* " *say, it was an accommodation for the passenger who* " *wished to go to the hotel,* we were delayed there for " five minutes always and sometimes longer, and he " was expected to cross over there, or leave from that " side of the train after the train had stopped.' Now, " does that refresh your recollection?"

"A. Well, I suppose I testified to that."

"Q. Did you hear the brakeman say why he had " opened that vestibule door?"

"A. Well, that particular one being near or op- " posite the hotel would allow the passenger to cross " over after the train had stopped, I think, as I under- " stood it at that time. This was done to allow him to " cross over, but not to get off. He could get off at " the station after the train had stopped, and then go " on back through two vestibule doors and across the " platform and then over to the hotel. He would " have either to go around the end of the train to the " hotel or while the train was standing still he could " cross through. I gave no one permission to cross " over that train while it was in motion, or to alight."

"Q. I will ask you if you didn't testify as follows: " Q. 'Who gives the brakeman instructions regarding " which side of the train they shall open the vestibule " doors? A. There are no instructions. Q. There " is a regular set of rules governing these things?"

"A. There is a custom and rules covering that."

"Q. They are supposed to be familiar with them? "A. Yes. 'Q. Would you understand, then, when "Mr. Mulville opened this door, the vestibule door on "the side of the train opposite from the depot to per- "mit this passenger to alight on that side, that he was "violating a rule of the company?' I call your atten- "tion to that question asked you by the coroner. 'A. "Well, if the passenger was not to alight until the "train had come to a stop I think it would be per- "fectly safe.' Did you so testify?"

"A. I suppose I did. A conductor is required to "give no instructions in a case as to how those things "are to be done."

"Q. I asked you if you didn't testify as follows, and "if that doesn't correctly state the fact. 'Q. Would "you understand then when Mr. Mulville opened this "door, the vestibule door on the side of the train op- "posite from the depot to permit this passenger to "alight on that side, that he was violating a rule of "the company? A. Well, if the passenger was not to "alight until the train had come to a stop, I think it "would be perfectly safe.' "

"Q. You so testified, did you not?"

"A. Yes, sir, I guess I did, and I intended to tes- "tify to the truth when I so testified."

It was upon this state of the evidence that the motion for a non-suit was granted. It has been frequently said that a motion for a non-suit is in the nature of a demurrer to the evidence. The same rule

applies upon such a motion, to the court, sitting without a jury, as in a case where the evidence is to be weighed and construed by a jury. Can it be said upon a perusal of the testimony in this case that there was not sufficient evidence to require its submission to a jury?

As hereinbefore pointed out, a non-suit can be granted only when it can be said, as a matter of law, that there is no substantial evidence to support the plaintiffs' case, that only one inference can be drawn from the evidence, and that resolving all conflicts in favor of the plaintiffs and resolving every doubt against the defendant, the cause should not be heard and determined by a jury.

There is nothing in the testimony of the witness Moran to discredit him, and even had there been any inconsistencies in his testimony, these inconsistencies could not be considered upon the motion for a non-suit; and further, if it appeared that the witness Mulville gave testimony in contradiction of the evidence given by Moran, this could not be considered upon such a motion, but would have to be submitted to a jury for the purpose of permitting the jurors to determine which of the witnesses should be given credence.

The record discloses that the deceased was unfamiliar with the station and town of Santa Margarita. He reached there at about eleven o'clock on a very dark night. The brakeman volunteered to open the vestibule doors on the side of the train opposite from the station where there were neither lights nor platform for the accommodation and protection of the

passengers. As the train approached the station, traveling at the rate of about seven or eight miles per hour, according to the statement of the brakeman and the allegation of the answer in this case, the brakeman led the way to the vestibule between the smoking car and the first coach. He proceeded to open the trap, stood upon one of the steps and bending over pointed out to Murray, who was immediately behind him and carrying a suitcase, certain lights, saying, "There is your hotel up there." He had previously told Murray that they would stop *opposite the hotel.* The evidence shows that Murray's body was found just about opposite the hotel. It is only fair to assume, and certainly a jury would be entitled to draw this inference, from the testimony in the case, that Murray, having been shown the hotel by the brakeman, and having been told that the train would stop opposite the hotel, and being about opposite the hotel when he attempted to alight, actually believed that the train had come to a standstill when he descended the steps. It was a very dark night; there was no light on the ground immediately below the car steps. The witness Moran testified that he discovered that the train was still in motion only by observing the bar of light shining from the car windows out upon the ground some distance beyond the train, and it is only fair to assume, at least this was another inference which a jury had the right to draw from the evidence, that Murray, in descending the steps, with a suitcase in his left hand, and holding on with his right hand, was looking down at the steps which he was descending; this is what a man of

ordinary prudence would do under the circumstances, and therefore if Murray was looking down at the steps, he would not have seen the light shining out upon the ground beyond, and would therefore not have had the same means of knowing that the train was in motion, that his companion had. The only conclusion that could be drawn from the evidence was, that Murray was invited by the words and actions of the brakeman to attempt to alight at the time and place that he did, or, at least, invited to descend the steps preparatory to his getting off. The evidence is not clear as to whether he stepped off the train or fell off, whether he reached the lower step and lost his balance by reason of the train's motion, or whether, hearing the warning from his friend, at the instant of attempting to step off the train, he lost his balance and fell to the ground. These were questions of fact to be determined by a jury like any other facts in doubt or in dispute. The honorable trial court would not be justified in taking these questions of fact, from which different inferences might be drawn, out of the hands of a jury, because it could not be said that only one inference, *i. e.*, that of contributory negligence, could be drawn from the testimony.

The witness Mulville discredited himself, not only by testifying differently from what he had testified to at the coroner's inquest, but according to his testimony, the train was at a standstill before Murray attempted to alight. On page 88 of the transcript, this witness states "When I went and opened the vestibule " door on the station side, and just as I got the vesti-

"bule opened, the train came to a standstill, *and I "looked back and Mr. Murray was still on the inside "of the car.*" The testimony of this witness also shows that he was violating rule No. 837 of the defendant corporation which provides that trap-doors inside the vestibule must be kept closed while the train is in motion. At the coroner's inquest, this witness testified that he had opened the door on the *front end* of the smoker on the side opposite from the station; while at the trial of this cause, he gave as an excuse for opening the vestibule doors, where Murray alighted, *that he did not have time to make the front end of the smoker.* If the latter statement be true then the train was going so *slowly* that he did not have time to go to the front end of the smoker, open the door on the opposite side from the station, but took the shorter route to the vestibule doors at the rear of the smoker. The jury undoubtedly gave very little credence to Mulville's testimony. He *denied* that he had opened the door for the purpose of letting Murray off on that side of the train, while at the coroner's inquest he stated that he *opened the door for Murray's accommodation.* Conductor Spear also testified that he heard the brakeman say that it was an accommodation for a passenger that caused him to open the vestibule door on the opposite side of the station.

In passing upon the correctness of the judgment on non-suit in this case, this court may consider only the evidence submitted by plaintiff. The whole and

every part of it is deemed to be true. The simple question is, does it sustain the cause of action?

The honorable trial judge could have granted the non-suit only upon the theory (1) that the plaintiff had failed to prove any negligence upon the part of the defendant, or (2) if there was proof of defendant's negligence that the deceased was guilty of such contributory negligence as would bar recovery by his surviving wife and child. The question of defendant's negligence and the alleged contributory negligence of the deceased are so intimately connected that both may be discussed together, not only as to the facts given in evidence, but as well as to the well-defined principles of law applicable thereto.

The statutory law of the State of California governing non-suits should be followed in this case (*Connecticut Fire Ins. Co.* vs. *Manning,* C. C. A. 177 Fed. 893); but it has been said that the federal courts are not bound by the decisions of the state courts with respect to negligence of common carriers (*Myrick* vs. *Michigan Central R. Co.,* 107 U. S. 1021), or with respect to contributory negligence (*Indiana St. A. R. Co.* vs. *Horst,* 93 U. S. 291; *No. Pac. R. Co.* vs. *Mares,* 123 U. S. 710). But inasmuch as the decisions of the state and federal courts are in practical harmony upon the subjects of non-suits, negligence of carriers and contributory negligence upon the part of passengers attempting to alight from moving trains, we may resort to both state and federal decisions for a solution of the legal questions arising herein:

"An action may be dismissed, or a judgment of non-suit entered, in the following cases:

"(5) By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." Sec. 581, C. C. P.

"A motion for a non-suit may not be granted if there be any evidence tending to sustain the plaintiff's cause of action."

Donovan vs. *Kemper,* 26 Cal. App. 352, 146 Pac. 1044.

The motion for non-suit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant.

O'Connor vs. *Mennie,* (Cal. Sup. Ct.), 146 Pac. 674;
Hoff vs. *L. A. etc. Co.,* 158 Cal. 596.

On a motion for a non-suit every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts in favor of the plaintiffs. Where the evidence is fairly susceptible of two constructions, or if any of the several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. All the evidence in favor of the plaintiffs must be taken as true and if contradictory evidence has been given, it must be disregarded, if there is any substantial evidence tending to prove all the facts necessary to sustain the

cause of action, they are entitled to have the case go to the jury for a verdict on the merits.

Estate of Arnold, 147 Cal. 583;
Boyle vs. *Coast Improvement Co.,* Cal. App. 151 Pac. 25.

If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court, but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury.

Jacobson vs. *Oakland Meat & Packing Co.,* 161 Cal. 425 (Ann. Cas. 1913b, 1194; 119 Pac 653);
Herbert vs. *S. P. Co.,* 121 Cal. 227.

If there is some evidence introduced on behalf of the plaintiff, showing that the deceased was not guilty of that degree of contributory negligence to which the cause of his injury might directly or proximately be imputed, then the question presented is one of fact and for the solution of the jury.

Payne vs. *Oakland Traction Co.,* 15 Cal. App. 127, 113 Pac. 1074.

To the same effect are:

Burr vs. *U. R. R. of S. F.,* 163 Cal. 663, 126 Pac. 873;
Christensen Lumber Co. vs. *Buckley,* 17 Cal. App. 37, 118 Pac. 466;

Mitchell vs. *Brown,* 18 Cal. App. 117, 122 Pac. 426;
Davis vs. *Crump,* 162 Cal. 513;
Lawyer vs. *L. A. Pac. Co.,* 161 Cal. 53;
Zibbell vs. *S. P. Co.,* 160 Cal. 237, 38 Cyc. 1558.

The rule has been declared with great clearness by Mr. Justice Henshaw in *Zibbell* vs. *Southern Pacific Co.,* 160 Cal. 237:

> "Whether or not a plaintiff has been guilty of contributory negligence is similar to the question whether or not the evidence in a criminal case is sufficient to sustain a verdict of guilty. It is usually a question of fact. It is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence; in the other case, that there was not sufficient evidence to sustain the verdict. But even in such cases, while the questions is said, and properly said, to be one of law, it is never a question of pure law. The real decision of the question by the court is a decision of fact. When the evidence is such that the court is impelled to say that it is not in conflict on the facts, *and that from those facts reasonable men can draw but one inference,* and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. It must follow, therefore, that cases from other jurisdictions can be of value to such a consideration only when one may be found which parallels in all its essential features the case under consideration. This, in the nature of things, can never, or rarely, happen. And, even if such a case be found, it cannot in any true

> sense be said to settle the law. * * * The law of this State is so well settled that it may be briefly summarized. Contributory negligence is a defense, the burden of proving which rests upon defendant. (*Schneider* v. *Market St. Ry. Co.*, 134 Cal. 482; *Hutson* v. *Southern California Ry. Co.*, 150 Cal. 701.) * * * It is incumbent upon the defendant to establish the existence of plaintiff's contributing negligence. Again, the question of whether or not a plaintiff has been guilty of contributory negligence is usually one of fact for the jury's verdict."

Therefore, applying the above rules to this case, it cannot possibly be said that contributory negligence exists here as a matter of law. It is extremely unreasonable to declare that only one inference and one conclusion is deducible from the evidence in this case. Considering each and every circumstance and event leading up to the accident, will it be said that the deceased was reckless or careless, disregarded his own safety, knowingly and intentionally placed himself in a position of danger, violated the natural principle of self-preservation, and failed, beyond all question of doubt, to conduct himself like an ordinarily prudent man would under like circumstances? Albeit, whether this can be said or not, the plaintiffs in this case had the right to have the question submitted to the jury, there to be considered and determined by them.

It is pointed out in the above decision that in the consideration of questions of this sort, cases from other jurisdictions can seldom be of any value. They can

aid "only when one may be found which parallels in "all its essential features the case under consideration. "This, in the nature of things, can never, or rarely, "happen. And even if such a case be found, it can- "not in any true sense be said to settle the law. Its "value will come from the persuasive force of its "reasoning—not upon the law—but upon the facts "to which the law forbidding the recovery has been "applied."

Zibbell vs. *Southern Pacific Co., supra.*

We now pass to the questions presented by the evidence in the case.

A carrier of passengers must exercise the highest degree of human care, prudence and foresight, and is liable for the slightest negligence in itself or servants.

Roberts vs. *R. R. Co.,* 14 Cal. App. 180, 6 Cyc. 592;
Trumbull vs. *Erickson,* 97 Fed. 891, 38 C. C. A. 536.

Proof of slight neglect will, it is held, render the carrier liable for injury to a passenger.

Seymore vs. *Chicago R. Co.,* 3 Biss (U. S.) 43, 21, Fed. Cas. 685.

Where a carrier himself creates the danger, he is bound to use adequate precaution for the safety of the passenger against such danger.

Brockway vs. *Loscala,* 1 Edm. Sel. Cas. (N. Y.) 135;
Klein vs. *Jewett,* 26 N. Y. Eq. 474.

The carrier is liable for the acts of its servants.

Fisher vs. *Fuse Co.,* 12 Cal. App. 739.

Where there is a conjoint continuous negligence, it is a question for the jury.

Lininger vs. *S. F. etc. R. R. Co.,* 18 Cal. App. 411.

Even if there be negligence on the part of the passenger, yet if at the time the injury was committed, the carrier might have avoided the resulting injury by reasonable care and prudence when aware of the peril, the carrier is liable.

Wilson vs. *Traction Co.,* 10 Cal. App. 103.

A carrier is required to exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest negligence, if any injury is caused thereby; and the carrier's duty is not ended by carrying a passenger safely from one point to another, but said carrier must set the passenger down safely, if, in the exercise of the utmost care, it can be done.

Evansville etc. R. Co. vs. *Athon,* (Ind.) 51 Am. St. Rep. 303.

It is negligence for an employe of a railroad to induce a passenger to leave a train while in motion.

Evansville etc. R. Co. vs. *Athon, supra;*
Jones vs. *Chicago etc. R. Co.,* 42 Minn. 183, 43 N. W. 1114;

Filer vs. *N. Y. Central R. Co.,* (N. Y.) 10 Am. St. Rep. 327;
Eddy et al. vs. *Wallace,* (C. C. A.) 49 Fed. 801;
Lake Erie etc. R. Co. vs. *Hoffman,* (Ind.) 97 N. E. 434;
Louisville etc. Co. vs. *Holsapple,* 38 N. E. 1107;
Atchison etc. R. R. Co. vs. *Hughes,* (Kan.) 40 Pac. 919;
Bucher vs. *N. Y. etc. R. R. Co.,* 98 N. Y. 128.

"It may be stated as a general proposition that when the conductor or brakeman, on the train, who is presumed to be familiar with the danger incident to getting on or off slowly moving trains, directs a passenger, who may be ignorant of such danger, to get off the train, although in motion, such passenger will ordinarily naturally presume that the conductor or brakeman knows that it is entirely safe, or he would not give the direction: *Filer* v. *New York Cent. R. R. Co.,* 49 N. Y. 47; 10 Am. Rep. 327; *Cincinnati etc. R. R. Co.,* v. *Carper,* 112 Ind. 26, 2 Am. St. Rep. 144; *Louisville etc. R. R. Co.* v. *Kelly,* 92 Ind. 371, 47 Am. Rep. 149; *Kentucky etc. Bridge Co.* v. *Quinkert,* 2 Ind. App. 244.

"The question whether such act is of itself contributory negligence depends in each case on the surrounding circumstances: *Terre Haute etc. R. R. Co.* v. *Buck,* 96 Ind. 346, 49 Am. Rep. 168."

Evansville etc. R. R. Co. v. *Athon,* 6 Ind. App. 295, 51 Am. St. Rep. 306.

It is not negligence *per se* to alight from a moving train.

Carr vs. *Eel River etc. R. R. Co.,* 98 Cal. 366;
Penn. R. R. Co. vs. *Marion* (Ind.), 18 Am. St. Rep. 330;

Harris vs. *Pittsburg etc. Co.* (Ind.), 79 N. E. 407;
Raub vs. *Ry. Co.*, 103 Cal. 476;
Finkedy vs. *Omnibus etc. Co.*, 114 Cal. 31;
Chicago etc. Co. vs. *Lampman,* (Wyo.) 104 Pac. 533;
Oklahoma Ry. Co. vs. *Boles,* 120 Pac. 1104;
Lake Erie Ry. Co. vs. *Hoffman,* (Ind.) 97 N. E. 434;
Atchison etc. R. R. Co. vs. *Hughes,* (Kan.) 40 Pac. 919.

It is not negligence *per se* for a passenger to alight on the non-platform side of the train.

McQuilken vs. *C. P. R. R. Co.*, 64 Cal. 463;
Owen vs. *Washington etc. R. Co.,* (Wash.) 69 Pac. 757;
Murphy vs. *S. P. Co.*, 2 Cald. 275;
Ky. & I. Bridge Co. vs. *McKinney,* (Ind.) 36 N. E. 448.

Whether deceased stepped from the train or fell by reason of the jarring or jerking of the train was a question of fact for the jury.

Chicago etc. R. Co. vs. *Lampmen,* (Wyo.) 104 Pac. 533.

Even if the brakeman warned the deceased while on the step, this was not sufficient to conclusively establish negligence of the deceased, and it was a question of fact for the jury to decide as to whether or not the warning was in time to be of any service to him.

Louisville etc. Co. vs. *Bean,* (Ind.) 36 N. E. 443.

The principal questions in this case, whether the defendant sufficiently induced or invited deceased to leave the train, whether the deceased knew that the train was moving when he attempted to alight, whether under the circumstances he believed that the final destination had been reached, whether the defendant was negligent in failing to properly care for the passenger by notifying him of the danger in alighting at that particular time, were questions for the jury.

> "Before reaching it (the station) the brakeman announced the station; several passengers arose to leave; the plaintiff then rose from her seat near the center of the car, walked out upon the platform, took hold of the rail, stepped down one step, and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. It was held, in an action to recover damages, that it was a question for the jury, whether, in the exercise of reasonable care and prudence, the defendant should not have given notice to passengers desiring to alight at the station *that the train had not come to a final stop,* but would back up; and that the plaintiff was justified under the circumstances, *in supposing she had reached her destination,* and in attempting to leave the car; at least, that the question of contributory negligence on her part was proper for the jury. * * * But the fact that the train overshot the station, rendering it necessary, after it came to a standstill, to start it back to the usual stopping-place, in connection with the other circumstances, made it a question for the jury, whether, in the exercise of reasonable care and prudence, the defendant should not have given

notice to passengers desiring to alight at the station that the train had not come to a final stop, and that it would back up."

Tabor vs. *Delaware etc. R. R. Co.*, 71 N. Y. 489, 7 Am. St. 833.

We have assigned as error the order of the trial court granting a new trial after the rendering by the jury of a verdict for plaintiff, and the entry of the judgment thereon. The same argument which we urge against the error in granting the non-suit applies to the error in granting the new trial. We contend that the evidence *in toto* is sufficient as to defendant's negligence to allow it to be passed upon by the jury; that it cannot be said that it is of such a character that it permits of but one conclusion on the questions of defendant's negligence and deceased's contributory negligence.

For these reasons, we earnestly maintain that the judgment upon the non-suit should be reversed, and that the judgment after the trial and upon the verdict of the jury should be affirmed.

Respectfully submitted,

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